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In the Supreme Court of the United States

OCTOBER TERM, 1944

DE BEERS CONSOLIDATED MINES, LTD., DIAMOND CORPORATION, LTD. AND DIAMOND TRADING COMPANY, LTD.

v.

UNITED STATES OF AMERICA

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO AND COMPANHIA DE DIAMANTES DE ANGOLA

v.

UNITED STATES OF AMERICA

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the district court (R. 97[1]) has not yet been reported.

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[1] The designation "R." will be used to refer to the record filed by Societe Internationale, etc., Du Congo and its co-petitioner, and the designation "DB" to refer to the record filed by De Beers Consolidated Mines, Ltd., and its co-petitioners. As to matters common to both records, reference will be made to the former record.

JURISDICTION

The order of the district court sought to be reviewed was entered on April 3, 1945 (R. 99). By motions for leave to file petitions for writ of certiorari filed in this Court shortly thereafter, petitioners seek to invoke the jurisdiction of this Court under Section 262 of the Judicial Code, 28 U. S. C. sec. 377.

QUESTION PRESENTED

Whether it is appropriate for this Court to issue writs of certiorari under Section 262 of the Judicial Code to review the action of the district court in granting a preliminary injunction prohibiting petitioners, *pendente lite*, from withdrawing or disposing of certain money and property in the United States belonging to petitioners.

STATUTES INVOLVED

Section 262 of the Judicial Code, 28 U. S. C. sec. 377, provides in part:

> The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

Section 2 of the Expediting Act of February 11, 1903, as amended, 15 U. S. C. sec. 29, provides in part:

> In every suit in equity brought in any district court of the United States under any of said Acts,[2] wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court * * *.

Section 4 of the Act of July 2, 1890, 15 U. S. C. sec. 4, known as the Sherman Act, provides in part:

> The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; * * *. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

STATEMENT

By a civil complaint filed in the court below on January 29, 1945, against nine foreign corporations and certain individuals the United States

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[2] The "said Acts" referred to are the Sherman Act, the Interstate Commerce Act, and any other act having a "like purpose." See *Columbia Gas & Elec. Corp.* v. *American Fuel & Power Co.*, 322 U. S. 379, 381.

charged the defendants with having been long engaged in a conspiracy to restrain and monopolize commerce of the United States with foreign nations in gem and industrial diamonds, in violation of Sections 1 and 2 of the Sherman Act (R. 6–9, 12). The defendants were also charged with conspiring to restrain free competition in trade of the United States and to increase the market price in this country of imported diamonds, in violation of Section 73 of the Act of August 27, 1894, 15 U. S. C. sec. 8, known as the Wilson Tariff Act (R. 12).

The complaint alleges, *inter alia:*

The defendant corporations and their subsidiaries produce and sell approximately 95% of all the diamonds produced in the world (R. 11);[3] the principal market for diamonds is in the United States, to which country the imports in 1942 and 1943 were greater than the total world production of diamonds in these years (ibid.); the defendants have controlled the marketing of diamonds in the United States principally by causing all diamonds produced in Africa to be sold through a single selling agency (R. 13); each corporate defendant has for many years transacted business in the southern district of New York and is found therein (R. 6); defendants have furthered their purpose of maintaining prices on diamonds sold for export to the

[3] The important sources of industrial diamonds are the Union of South Africa and other areas in Africa, such as the Belgian Congo and Portuguese Angola (R. 10).

United States by numerous acts done in this country (R. 22); their combination has consisted of continuing agreement:

> (a) to prevent dealers and consumers in the United States from purchasing diamonds from the producers, (b) to prevent all sale or purchase of diamonds for export to or import into the United States except by purchase through Diamond Trading Company and except subject to terms and conditions set by defendants, (c) to prevent all persons in the United States other than certain favored brokers, dealers, and cutters from purchasing diamonds from the Diamond Trading Company, (d) to limit the production and supply of diamonds, (e) to limit and restrict the quantity of diamonds imported into the United States, and (f) to fix, stabilize, and enhance the prices at which diamonds are sold in the United States (R. 12–13).

The United States filed with the complaint an application for a temporary restraining order to restrain the corporate defendants from withdrawing or disposing of their property within the United States until the district court should have determined the issues and the defendant corporation should have complied with its orders (R. 28–29). The Government also filed at the same time a motion for a preliminary injunction of the same scope and effect (R. 34). The requested temporary restraining order was granted (R. 30–31).

Argument on the motion for a preliminary injunction was postponed until March 2, 1945, at the request of defense counsel (R. 40, 42, 43, 51), and the court on March 28, 1945, rendered its opinion on the motion (R. 97).

The court held that under Section 4 of the Sherman Act and Section 262 of the Judicial Code it had power to issue the requested injunction (R. 97–98). On the question of exercise of this discretionary power, the court concluded from the facts appearing in the verified complaint and in the affidavits supporting and opposing the Government's motion, that if injunction should not issue the corporate assets "will in all probability be withdrawn from this country", in which event there would be "no way to enforce" the court's decree if the Government should prevail (R. 98). As bearing upon the proper exercise of its discretion, the court noted the "incomparably greater" damage to the Government if the injunction were denied than any damage to the defendants resulting from granting it, and the principle that equity will take necessary steps to protect its jurisdiction where there is a great probability that enforcement of its decrees will otherwise be frustrated (*ibid.*).[4]

[4] Prior to this decision the court's restraining order had been continued and modified in various ways to accommodate the business needs of the defendants (R. 35, 37–38, 41, 43, 51–53, 68–70, 75).

The court said that the question whether the defendants were doing business in this country was not before it on the motion and that it was not passing on this question (R. 98). The court adopted the facts alleged in the verified complaint as its findings of fact for the purposes of the motion only (*ibid.*).

The preliminary injunction which the court below granted does not apply to any property of the corporate defendants brought into this country after January 29, 1945, the date on which the court's temporary restraining order was issued (R. 101–102).

ARGUMENT

I

The appropriateness of issuing writ of certiorari under Section 262

Normally preliminary injunctions granted by district courts are reviewable by the circuit courts of appeals under Section 129 of the Judicial Code, 28 U. S. C. sec. 227, and their final judgments are reviewable by circuit courts of appeals under Section 128 of the Judicial Code, 28 U. S. C. sec. 225. With reference to the change made by the Expediting Act, this Court said in *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558:

> These provisions governing appeals in general were amended by the Expediting Act so that in suits in equity under the antitrust

act "in which the United States is complainant," the appeal should be direct to this Court from the final decree in the trial court. Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters (see *Collins* v. *Miller*, 252 U. S. 364); and it precluded the possibility of an appeal to either court from an interlocutory decree.[5]

This rule and the policy it serves would be impaired if review of an interlocutory decree entered in a civil proceeding brought by the Government under the Sherman Act may be obtained by means of a writ from this Court under Section 262 of the Judicial Code. The grant of such a writ under these circumstances would also be in conflict with a more general policy. From the time of Chief Justice Marshall to the present day this Court has firmly set its face against use of the extraordinary remedies authorized by Section 262 to bring up for review interlocutory rulings in proceedings as to which Congress has permitted appeals only from final judgments. To do so would be to "thwart the Congressional policy against piecemeal appeals" and would be a "plain evasion" of the mandate of Congress that appellate review be confined to final judgments. *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30, and cases cited at pp. 30–31; *Bank of Columbia* v. *Sweeney*, 1 Pet. 567, 569.

[5] See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137, 142–143.

This is not a case where the ruling of the inferior court had the effect of preventing adjudication of the cause pending before it and therefore thwarted or tended to thwart appellate review. See *Ex parte United States*, 287 U. S. 241; *Whitney* v. *Dick*, 202 U. S. 132. Nor is it a case in which the action of the district court in denying a foreign Government's claim of immunity, which the political branch of our Government had supported, might endanger the conduct of our foreign relations, so that prompt appellate review was of "public importance." *Ex parte Peru*, 318 U. S. 578.

It is doubtful whether it would ever be appropriate to employ any of the extraordinary remedies authorized by Section 262 to review the question whether an inferior court had, in a matter calling for the exercise of judicial discretion, improperly exercised its discretion.[6] Certainly the remedy would be appropriate only if there had been a gross abuse of discretion or a plain miscarriage of justice. Upon the facts of the present case, the action of the district court, in granting the preliminary injunction, was well within the range of judicial discretion. Upon balancing (1) the injury to the Government to be anticipated

[6] The basis of the ruling in *Ex parte United States*, 287 U. S. 241, was that the act which the district court had erroneously failed to perform was not discretionary but ministerial.

from a withdrawal of assets which might defeat the effectiveness of any decree issued in the cause and (2) the injury to the petitioners caused by the preliminary injunction, it is clearly permissible to conclude that the balance lies in favor of granting the requested injunction. The actual burden imposed upon the defendants is no more than the cost of procuring a bond so conditioned as to protect the United States against the consequences of lifting the restraints of the present preliminary injunction.[1]

The question of the power of the district court to grant the preliminary injunction does not, we submit, raise a question of public importance or one which would make it appropriate for this Court to intervene by a writ under Section 262 notwithstanding the resulting circumvention of the appellate procedure prescribed by Congress. This case does not involve, as do the export association cases (Nos. 1016, 1017, this Term), a question of the respective jurisdictions of the federal district courts and a Governmental agency, determination of which in favor of the petitioners in those cases would terminate the litigation. Even in

[1] The condition of such a bond might be that if a final decree on the merits be entered against petitioners, and if they shall fail to perform acts required of them by the decree, and if upon the issuance of sequestration for contempt under Rule 70 of the Rules of Civil Procedure they shall be found without goods or funds within the jurisdiction in the amount as to which they are now restrained by the preliminary injunction, the difference shall be paid into court.

the export association cases this Court appears to be in doubt as to the appropriateness of reviewing an interlocutory ruling in a Sherman Act proceeding by a writ under Section 262; the Court in granting the writs requested counsel to discuss this question in their briefs and on oral argument

Even if the district court exceeded its power in granting the preliminary injunction it does not follow that immediate correction of the error is of public importance. Those adversely affected are private parties.[8] The injury suffered through delay in rectifying the error until appeal can be taken from final judgment—the cost of furnishing an appropriate bond—would seem far less burdensome than the necessity of standing trial in a complicated litigation where the trial court has erroneously overruled a demurrer to the complaint or indictment. But this Court, in holding that such burden does not furnish ground for correction by a writ under Section 262, has said that it "is one which we must take it Congress contemplated in providing that only final judgments should be reviewable." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 30.

If certiorari should be granted both in the export association cases and in the present cases

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[8] While it appears that a foreign government owns stock in one of the petitioners (R. 84) such a financial interest does not make the corporate defendant any less a private party. An affidavit filed by the Government states that the stock so held by the foreign government is non-voting stock (R. 54).

this Court is likely to be confronted with a flood of applications for writs to review interlocutory rulings by district courts in proceedings under the Sherman Act. The question of where the line is to be drawn between review and non-review by means of the extraordinary remedies authorized by Section 262 will, it would seem, have to be fought over in many cases.

II

The power of the District Court to grant the preliminary injunction

There can be no doubt that the district court had power to grant the injunction. Section 4 of the Sherman Act (*supra*, p. 2), which confers jurisdiction upon the district courts to entertain petitions filed by the Government to restrain violations of that Act, provides that the court may at any time before final decree "make such temporary restraining order or prohibition as shall be deemed just in the premises."

Section 262 of the Judicial Code (*supra*, p. 2) also authorizes district courts to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their jurisdiction, "and agreeable to the usages and principles of law."

Federal district courts in proceedings in which equity jurisdiction is conferred upon them possess the general powers of a court of chancery.

Sprague v. *Ticonic Bank*, 307 U. S. 161, 167; *Fitch* v. *Creighton*, 24 How. 159, 162–163; *Waterman* v. *Canal Louisiana Bank Co.*, 215 U. S. 33, 43–44; *Irvine* v. *Marshall*, 20 How. 558, 564–565.

Among their powers as courts of chancery, the district courts specifically possess the power to enjoin a defendant's disposition of his assets pending the proceedings. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 290. This power to enjoin disposition of assets is not limited or governed by Rule 64 of the Rules of Civil Procedure and is not, therefore, limited to the remedies given by State law. Issuance of preliminary injunctions is provided for by Rule 65 of the Rules of Civil Procedure.

Use of the injunctive power by federal courts sitting in equity is proper for the purpose of preserving the effective jurisdiction of the court. *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214; *Kline* v. *Burke Construction Co.*, 260 U. S. 226. Use of the injunctive power is proper to prevent acts by defendant which will frustrate the plaintiff's remedy. *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 290; *Ohio Oil Co.* v. *Conway*, 279 U. S. 813. Where the preliminary injunction is not sought as a means to obtain *in limine* all the ultimate relief upon the merits of the case but is sought for these protective purposes, the injunction should be granted if the questions raised on the face of the complaint are grave and important

and if the balance of convenience between the parties favors the plaintiff. *Ohio Oil Co.* v. *Conway, supra.* In the case cited this Court held that the district court abused its discretion in denying a preliminary injunction against the collection of State taxes which were alleged to be unconstitutional and which, on the facts before the district court, were not recoverable after payment. Where a preliminary injunction was thus necessary in order to prevent loss of remedy for the plaintiff, this Court thus stated (p. 815) the test of the propriety of issuing a preliminary injunction:

> Where the questions presented by an application for an interlocutory injunction are grave and the injury to the moving party will be certain and irreparable if the application be denied and the final decree be in his favor, while if the injunction be granted the injury to the opposing party, even if the final decree be in his favor will be inconsiderable, or may be adequately indemnified by a bond, the injunction usually will be granted.

Preliminary injunctions may even be granted to afford preliminary relief on the merits where the questions raised by the plaintiff are grave and where he will suffer substantial loss during the litigation if preliminary injunction is denied. *Gibbs* v. *Buck*, 307 U. S. 66, 77–78.

The present petitioners' challenge of the power of the district court to grant the preliminary

injunction must go so far as to say that even if they, while admitting they were subject to the court's jurisdiction, should announce that they intend to flee the jurisdiction and withdraw all their funds and thus deliberately act so as to render the court impotent, the court would nevertheless be powerless to interfere. The decisions previously cited establish that the court may interfere to prevent any such frustration of the rights asserted by the plaintiff, which in this case is the United States. Courts of equity frequently go much further either to give or to withhold relief in furtherance of the public interest than where only private interests are involved. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515, 552.

In proceedings under Section 4 of the Sherman Act, district courts exercise all the powers of a court of equity to adjudicate the cause and to give effective relief. Such proceedings are in chancery. *Swift & Co.* v. *United States,* 276 U. S. 311. The power conferred to grant preliminary injunctions is not confined to those which "prevent and restrain violations" of the Sherman Act and the contrary citations in the De Beers petition (p. 17) are, we submit, not even remotely in point. Section 4 does not in terms authorize a district court to enjoin one who has violated the Act from engaging in *any* interstate commerce, but this Court has held that such an injunction could and should be entered if necessary or convenient

in order to make the relief decreed by the court effective. *United States* v. *American Tobacco Co.*, 221 U. S. 106, 188. If, to achieve such purpose, the court's final decree may so provide, the power to grant a preliminary injunction may be so exercised as to enable the court to enter an effective final decree.

Certain contentions advanced by petitioners in challenge of the district court's power are irrelevant because they relate to matters which either are not a basis of or are not a necessary foundation for the injunction issued below. Other questions raised by them go, not to the power of the district court, but to the proper exercise of its discretion.

Petitioners contend that attachment or seizure is not permissible under the circumstances of this case. But the injunction is not an attachment or seizure.

The injunction is not an attachment. Under State practice attachment may afford a means of proceeding *in rem* for relief against an absent defendant.* This the injunction does not do. If it is found that the district court does not have

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* Before adoption of the new rules, it was settled law that State attachment remedies are not available in federal courts against absent defendants. *St. Louis B. & M. Ry. Co.* v. *Taylor*, 266 U. S. 200, 208; *Big Vein Coal Co.* v. *Read*, 229 U. S. 31, 37–38. In *Davis* v. *Ensign-Bickford Co.*, 139 F. 2d 624, 625–626 (C. C. A. 8), it was held that the previous law was not changed by the Rules.

personal jurisdiction as to any petitioner, as to it the preliminary injunction falls.

The injunction is not a seizure. Rule 64 of the Rules of Civil Procedure makes available in federal courts State remedies through seizure, as by attachment, replevin, distress, arrest, and the like. This Rule does not disturb the injunctive powers of district courts and issuance of preliminary injunction is regulated by Rule 65. It is as part of their powers as courts of chancery that federal district courts may enjoin *pendente lite* disposition of a defendant's assets (*Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 290) and the procedure of federal courts in injunction and receivership proceedings is by virtue of these powers rather than in exercise of remedies under State law of the kind made available by Rule 64 (Moore's *Federal Practice* (1938), § 64.01).

The injunction below is not a sequestration. No question of actual seizure or of forefeiture can arise unless and until sequestration should be applied for under Rule 70 after non-compliance with a final decree in the Government's favor.

The injunction below is not an exercise of means to compel defendants to appear. Neither the terms nor the practical effect of the injunction compel petitioners to appear in the district court or confer upon it jurisdiction over their persons. If the Government does not establish such jurisdiction, the restraint of the injunction ends. But

if petitioners are found to have been in the jurisdiction of the court at the time the complaint in this case was filed, what the injunction does prevent is a withdrawal of assets which would have the effect of a flight from the jurisdiction. The injunction is therefore not a *distringas* or a writ of *peine fort. et dure.*

Petitioners inferentially assert that the complaint does not state a valid cause of action. They have not moved to dismiss the complaint upon the merits, either by motion for judgment on the pleadings under Rule 12 (c) or by motion for summary judgment under Rule 56, but they insist that if the case is doubtful a preliminary injunction should not issue. This is a contention as to the proper exercise of the district court's discretion, not its power to issue the injunction. Furthermore, it is when the preliminary injunction grants relief of the character of the ultimate relief sought that courts are reluctant to grant preliminary relief if there is doubt as to whether the plaintiff will ultimately prevail, but where, as here, the preliminary relief is for the purpose of protecting the plaintiff against possible loss of all remedy, relief should be granted if the balance of convenience favors the plaintiff. *Ohio Oil Co.* v. *Conway*, 279 U. S. 813, 815.

The Government submits, in addition, that the complaint clearly states a valid cause of action. It sets forth a combination by those controlling

95% of total world production to restrain the import trade of the United States in gem and industrial diamonds and to maintain high prices for diamonds in this country. It alleges that the combination has had this effect and that it has been carried out and made operative within the United States by numerous acts in furtherance thereof performed within this country. Such a combination violates the Sherman Act. *United States* v. *Pacific & Arctic Railway & Navigation Co.*, 228 U. S. 87; *Thomsen* v. *Cayser*, 243 U. S. 66; *United States* v. *Sisal Sales Corp.*, 274 U. S. 268; *United States* v. *Aluminum Company of America* (C. C. A. 2), No. 144, October Term 1944, decided March 12, 1945, pp. 1246–50.

The question of whether the district court properly exercised its discretion in granting the preliminary injunction has been attacked by petitioners from so many angles that we wish, in conclusion, to summarize the considerations relevant to the action which it took.

The need for the injunction was imperative to enable the court to give effect to any final decree entered against the petitioners. Only through sequestration of their funds located here, for noncompliance with a final decree against them on the merits, as authorized by Rule 70 of the Rules of Civil Procedure, will the district court have power to afford the Government relief and to make the court's final judgment effective. The cause of

action is not transitory and, we assume, final judgment therein, though entered against parties within the court's jurisdiction, could not be enforced in the courts of a foreign country, as could a judgment on a proprietary or pecuniary claim. Petitioners have every reason to withdraw their funds before the remedy of sequestration could be enforced. The present certiorari proceedings are directed toward obtaining freedom to remove their funds. No showing has been made of hardship or burden in the giving of a security bond which would permit the lifting of the present restraint. It appears to be petitioners' objective to put themselves in a position which will enable them to disobey, with impunity, any decree on the merits which the court may enter against them. We submit that on the question of need and of balance of injury the district court could have arrived at no other conclusion than that reached and that, in any event, there was no abuse of discretion meriting review by an extraordinary remedy under Section 262 of the Judicial Code.

III

Petitioners' application for a stay of the District Court's order

The petitioners on April 6, 1945, submitted to Mr. Justice Jackson of this Court applications for a stay of the district court's order. The grounds of the Government's opposition to such a stay are

set forth in a memorandum entitled "Note of Argument for the United States in Opposition to the Application for Stay of the District Court's Order of April 3, 1945" submitted to Mr. Justice Jackson on April 6, 1945, nine copies of which have been furnished to the Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the motions for leave to file petitions for writs of certiorari should be denied.

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